EXCELSIOR HOTEL PTE. LTD.

v.

HIAP BEE (SINGAPORE) PTE. LTD. & OCBC FINANCE (SINGAPORE) LTD. (INTERVENORS)

HIGH COURT, SINGAPORE
CHAO HICK TIN JC
[SUIT NO. 1868 OF 1987]
4 OCTOBER 1989

CONTRACT: *Sale and purchase - Payment in instalment - Deed of assignment and mortgages in escrow - Default - Specific performance - Repudiation - As under the agreement - Specific performance - Common Law remedy - Whether superceded by Agreement - Clause 6(3) 1979 Rules and Clause 5(3) 1985 Rules.*

The plaintiffs were the vendors and the defendants were the purchasers of two units of shopping premises at the Excelsior Hotel and Shopping Centre, Coleman Street. The sales were governed by the Sale of Commercial Properties Rules 1979 and the two agreements of sale and purchase (sale agreements) were executed by the parties on 12 September 1983.

The intervenors were the chargees of the said units under two separate deeds of assignment and mortgages in escrow. The deeds were executed as securities for the progressive payments to be made by the intervenors, on behalf of the defendants, to the plaintiffs towards the purchase price of the said units.

Under the sale agreements, the price for the said units was to be paid in instalments in accordance with the progress of the construction of the project. There were default in paying up the instalment due. Pursuant to Clause 14 of the sale agreement, the plaintiffs' solicitors by their letter of 15 January 1987 gave the defendants' solicitors notice to complete the sale and purchase. The defendants failed to pay up the amounts due to complete the transactions as required. There were also outstanding service charges.

The plaintiffs claimed for specific performance of the two sale agreements and a declaration that the plaintiffs were entitled to a lien on the said units in respect of the sums due and owing by the defendants and an order that in default thereof the plaintiffs be at liberty to apply to enforce the lien.

The plaintiffs sought a summary judgment by way of a summon-in-chambers, in terms as aforesaid in respect of only one of the two units. The application was refused by the Senior Assistant Registrar who instead ordered that the plaintiffs should proceed under Clause 6(3) of the sale agreements.

The plaintiffs appealed to the Judge in chambers. The issue was in view of the Clause 6(3), could the plaintiffs still ask for specific performance? The Counsel for the intervenors also seeks the interpretation of Clause 6(3) under the 1979 Rules and Clause 5(3) under the 1985 Rules.

Held:

[1] There is an order for specific performance and a declaration in that the plaintiffs were entitled to a lien for the unpaid balance of the purchase price. The plaintiffs were also at liberty to apply to enforce the lien of sale.

[2] Under common law it is clear that a vendor of immovable property has much right to seek for specific performance of a contract of sale as that of a purchaser and there is nothing under the sale agreements, in particular Clause 6(3) or in the Act or the Rules which takes away or restricts the common law right for the remedy of specific performance. Clause 6(3) merely gives the vendors an option to treat the sale agreements as having been repudiated if any instalment is overdue for the specified period and in that event certain prescribed consequences will follow. There is nothing in Clause 6(3) which detracts from a vendor's common law right to seek specific performance.

[3] The words "without prejudice to any other rights available to him at law or in equity" are not found in the 1979 Rules. The absence of those words do not necessarily suggest that the Common Law right of the vendor to ask for specific performance has been restricted or ousted. The inclusion of the words in the 1985 Rules merely meant that in the event the vendor opts to proceed under Clause 5(3) and treats the default as a repudiation, other rights (if any) of the vendor under general law, which are not covered under clauses 5(3)(a), (b) and (c), are not prejudiced.

[Appeal allowed.]

Cases referred to:
Eastern Countries Rly. Co. v. Hawkins [1885] 5 HL Cas 331
Cogent v. Gibson [1864] 33 Beav 5557
Turner v. Bladin [1951] 82 CLR 463
Johnson v. Agnew [1979] 1 All ER 883
Re Birmingham (deceased) [1958] 2 All ER 397

Legislation referred to:
Sale of Commercial Properties Act [Sing], s. 5

Other sources referred to:
Jones & Goodhart on Specific Performance, (1986 Edn., 91)
Halsbury's Laws of England, (4th Edn.,) 414

JUDGMENT

Chao Hick Tin JC:

The plaintiff were the vendors and the defendants were the purchasers of two units (B1-10 and B1-17) of shopping premises at the Excelsior Hotel and Shopping Centre, Coleman Street. The sales were governed by the Sale of Commercial Properties Rules, 1979 and the two agreements of sale and purchase (sale agreements) were executed by the parties on 12 September 1983.

The intervenors were the chargees of the said units under two separate deeds of assignment and mortgages in escrow. The deeds were executed as security for the progressive payments to be made by the intervenors, on behalf of the defendants, to the plaintiffs towards the purchase price of the said units.

Under the sale agreements, the price for the said units was to be paid in instalments in accordance with the progress of the construction of the project. There were defaults on the defendants' part in paying up the instalments due. Pursuant to Clause 14 of the sale agreements, the plaintiffs' solicitors by their letters of 15 January 1987 gave the defendants' solicitors notice to complete the sale and purchase. The defendants failed to pay up the amounts due and to complete the transaction as required. There were also outstanding service charges due from the defendants in respect of the said units.

By this action the plaintiffs claimed specific performance of the two sale agreements and a declaration that the plaintiffs were entitled to a lien on the said units in respect of the sums due and owing by the defendants and an order that in default thereof the plaintiffs be at liberty to apply to enforce the lien. By way of a summons-in-chambers, the plaintiffs sought a summary judgment in terms as aforesaid in respect of only one of the two units (Unit No. B1-10).

The application for summary judgment came up for hearing before the Senior Assistant Registrar who refused to grant specific performance and instead ordered that the plaintiffs should proceed under Clause 6(3) of the sale agreement. The plaintiffs appealed to the Judge in chambers and the matter came before me. I allowed the appeal.

Before I go into the arguments, I think it is necessary for me to set out Clause 6(3) of the sale agreement in full:

> 6(3) If any of such unpaid instalments and interest remains unpaid for any period in excess of forty (40) days after its due date, the vendor shall be entitled at his option on giving to the purchaser or his solicitors not less than thirty (30) days' notice in writing to treat this agreement as having been repudiated by the purchaser and (unless in the meanwhile such unpaid instalment and interest shall have been paid) this agreement shall at the expiration of the said notice (and in this respect time shall be of the essence) be annulled and in such an event:
>
> (a) the vendor shall be entitled to deal with or otherwise dispose of the said unit in such manner as the vendor shall see fit as if this agreement had not been entered into;
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> (b) the instalments previously paid by the purchaser to the vendor excluding any interest paid shall be dealt with and disposed of as follows:
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> (i) firstly, all interest calculated in accordance with para. (1) hereof owing and unpaid shall be paid to the vendor;
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> (ii) secondly, a sum equal to twenty-five (25) per cent of the balance thereof shall be paid and forfeited to the vendor; and
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> (iii) lastly, the residue thereof shall be refunded to the purchaser;
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> (c) neither party hereto shall have any further claims against the other for costs, damages, compensation or otherwise hereunder; and
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> (d) each party hereto shall pay its own costs in the matter.

The issue raised before me was a narrow one: in view of the provisions in Clause 6(3), could the plaintiffs still ask for specific performance? The plaintiffs argued that nothing in the sale agreement precluded them from seeking specific performance of the contract, as that was a common law remedy available to a vendor. They said that the remedy specified in Clause 6(3) was not exclusive of all other remedies available under common law to a vendor. As provided in that clause, it was at the option of the plaintiffs (as vendors) whether they wished to treat the sale agreement as having been repudiated.

On the other hand, the defendants and the intervenors submitted that the remedy provided in Clause 6(3) superseded all other remedies which might be available to a vendor under general law. They said that under s. 5 of the Sale of Commercial Properties Act (Act) every sale of a commercial property must be effected in accordance with the terms and conditions prescribed under the Act and that any agreement entered into which was inconsistent with the terms and conditions of sale so prescribed by the Rules would, to the extent of the inconsistency, be null and void. Therefore, they contended that in accordance with the scheme

of things laid down under the Act and the Rules the remedy set out in Clause 6(3) was the only one available to a vendor in the event that the purchaser should be in default and fail to complete the sale as required.

Under Common Law it is clear that a vendor of immovable property has much right to ask for specific performance of a contract of sale as that of a purchaser. *Jones & Goodhart on Specific Performance* (1986 Ed) states the following at p. 91:

> As long ago as 1804 Sir William Grant MR said that a Court of equity will always decree specific performance of a contract for land; it is 'as much of course on this Court to decree a specific performance, as it is to give damages at Law'. Damages are only deemed to be an adequate remedy if the defendant has an equitable defence to the plaintiff's claim. Land is deemed to have a special and peculiar value for the purchaser, and no enquiry is made as to the value of the land or as to the possibility that a substantially similar piece of land may be obtained elsewhere. The vendor can also sue for specific performance although the claim is merely to recover a sum of money. He can do so, 'although at the date of the writ the contract has been fully performed except for the payment of the purchase price or part thereof.'

Halsbury's Laws of England (4th Ed) at para. 414 states the following:

> Since land may have 'a peculiar and special value' to a purchaser, a claim for specific performance of an agreement to sell or grant an interest in land will not be refused on the ground that damages would be an adequate remedy, even if the interest to be granted is a lease for a short term or a mere contractual licence to enter on land for a temporary purpose.
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> The principle of mutuality is applicable, so that a vendor of an interest in land, or of other property of such a nature that damages would be an inadequate remedy to the purchaser, may be entitled to an order for specific performance even though damages would be an adequate remedy for the vendor himself.

In *Eastern Countries Rly Co. v. Hawkes* [1855] 5 HL Cas 331 at 376 Lord St. Leonards explained that damages would not be an adequate remedy for a vendor because he would not have divested himself of the estate.

In *Cogent v. Gibson* [1864] 33 Beav 5557, where there was a contract for the sale of a patent, Romilly MR, held that the contract was specifically enforceable at the suit of the vendor although all he required was the payment of the purchase money. This position of the law was affirmed by the Australian High Court in *Turner v. Bladin* [1951] 82 CLR 463 at 473 where it stated:

> We are of the opinion that where the contract is of such a kind that the purchaser can sue for specific performance, the vendor can also sue for specific performance, although the claim is merely to recover a sum of money and that he can do so although at the date of the writ the contract has been fully performed except for the payment of the purchase money or some part thereof.

Finally, in *Johnson v. Agnew* [1979] 1 All ER 883 at 889 Lord Wilberforce made, *inter alia*, the following pronouncement (to which the other four Law Lords agreed) as regards the recourse available to a vendor in the event of a failure on the part of a purchaser to complete the transaction:

> First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the Court an order for specific performance with damages

> for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors). This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly, the vendor may proceed by action for the above remedies (*viz* specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.

In the light of these authorities, it seems to me that the Common Law position of a vendor of immovable property is quite clear. The real question is therefore whether there is anything in the sale agreement, and in particular Clause 6(3) thereof, or in the Act or the Rules made thereunder, which takes away or restrict the Common Law right of the plaintiffs to ask for the remedy of specific performance. Neither Counsel for the defendants nor Counsel for the intervenors was able to point to anything specific in the sale agreement. There is Clause 27, which is in these terms:

> The said unit is sold subject to the terms and conditions contained in this agreement and to the general conditions of sale known as 'The Singapore Law Society's conditions of sale, 1981' so far as they are not varied by or are inconsistent with the said terms and conditions of this agreement.

Again neither Counsel was able to identify anything in the Singapore Law Society's Conditions of Sale 1981, which would have a bearing on the question before me.

I will now proceed to consider the scheme of things under the Sale of Commercial Properties Act and the 1979 Rules prescribed thereunder. The Act was enacted, to use the words of the long title, to "regulate the sales of separate units of commercial properties in a commercial complex". Under s. 3(1), no person shall sell any commercial property unless the plans for the construction of the commercial property have been approved by the building authority. And under s. 5, an agreement for the sale and purchase of a commercial property must contain the prescribed terms and any term in an agreement which is inconsistent with the prescribed terms, shall, to that extent of the inconsistency, be null and void. Under r. 7 of the Rules, alterations or amendments to the terms of the standard agreement are not permitted except with the approval in writing of the controller of housing, for completeness, I ought to mention that the Act and the Rules also contain provisions relating to the grant of an option to purchase commercial properties and on assignment, which do not concern us here.

The sale agreement of the instant case was drawn up in accordance with the prescribed terms. Clause 6(1) and (2) provides that interest at 12% per annum would be payable on any instalment due and not paid. Clause 6(3) gives the plaintiffs the option to treat the agreement as having been repudiated if any instalment remains unpaid for a period in excess of 40 days after due date. To exercise this option the plaintiffs must give 30 days' notice in writing to the purchasers (the defendants). Other than these, I could not find anything else in the sale agreement which has any bearing whatsoever.

I am unable to see how one could reasonably construe Clause 6(3) as having impliedly ousted or restricted the Common Law remedy of specific performance which ordinarily would be available to a vendor of immovable property. A close examination of Clause 6(3) would show that it merely gives the vendor an option to treat the sale agreement as having been repudiated if any instalment is overdue for the specified period and in that event certain prescribed consequences will follow. But the vendor is not obliged to take that course. Surely, in the absence of express provisions, or words which must necessarily imply the ousting or

restriction of his Common Law rights, a vendor should not be denied or deprived of the remedy of specific performance, if he otherwise shows that he is entitled to it. The defendants and the intervenors had not argued that the plaintiffs here were not otherwise entitled to it. In my opinion, there is nothing in Clause 6(3) which detracts from a vendor's Common Law right to seek specific performance.

I think I am fortified in this view by the decision of the Court in *Re Birmingham* (deceased) [1958] 2 All ER 397. That is a case where the Court had to decide whether the unpaid balance of the purchase money of a house at the date of the testatrix's death ought to be borne by the devisee of the said house or ought to be paid out of the testatrix's residuary estate. There the contract of sale incorporated Clause 32(1), (2) & (3) of the English Law Society's Conditions of sale which provided for a vendor reselling after notice on the purchaser's default. The said Clause 32 read:

> (1) If a purchaser shall fail to perform his part of the contract, the vendor may give to the purchaser or to his solicitor at least fourteen days notice in writing specifying the default and requiring the purchaser to make good the same before the expiration of the notice.
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> (2) If the purchaser does not comply with the terms of the said notice - (a) the deposit money, if any, shall be forfeited to the vendor, or, in the case of settled land, to his settled Land Act trustees; (b) the vendor may resell the property without previously tendering a conveyance to the purchaser; (c) the contract shall, without prejudice to the vendor's rights to resume possession (if given up) and recover documents belonging to him, become void, save and except that the following provisions shall apply.
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> (3) Any resale may be by auction or private contract, at such time, subject to such conditions, and in such manner generally, as the vendor may think proper.

There the argument was raised that Clause 32 prevented any lien or charge arising. Upjohn J dealt with this argument as follows at p. 399:

> Paragraphs (1), (2) and (3) of Clause 32 apply to this sale, although paras. (4) and (5) do not, and give a vendor certain rights if a purchaser fails to fulfill his part of the contract. The vendor may give a notice, and if he does give a notice and it is not complied with, then certain remedies are available him. Those remedies are set out in para. (2). It is said that ousts the equitable lien which, at any rate after the date fixed for completion, would arise under the operation of the general law. I am quite unable to accept that argument. The remedies provided by Clause 32, in my judgment, are additional to and not in any way in derogation of the vendor's general rights according to law. If he choose to avail himself of the particular remedy of Clause 32, different consequences may flow; but until he does exercise that right, I can see nothing in the terms of the contract which prevents the ordinary vendor's lien for unpaid purchase money arising.

There is one other point made by Counsel for the intervenors. He asked me to compare the provisions of Clause 6(3) under the 1979 Rules and Clause 5(3) under the 1985 Rules. I think it would facilitate comparison if I set out Clause 5(3) under the 1985 Rules (which are the Rules now in force) and it reads:

> 5(3) If any instalment and interest remain unpaid for more than fourteen (14) days after its due date, the vendor shall be entitled at its option on giving to the purchaser or his solicitors not less than twenty-one (21) days' notice in writing to treat this agreement as having been repudiated by the purchaser and (unless in the meanwhile such unpaid instalments and interest shall have been paid) this agreement shall at the expiration of such notice (and in this respect time shall be of the essence) be annulled and in such an event without prejudice to any other rights available to him at law or in equity, the vendor shall be entitled:

(a) to resell or otherwise dispose of the building unit as the vendor shall see fit as if this agreement had not been entered into;

(b) to recover from the instalment (excluding interest) previously paid by the purchaser all interest calculated in accordance with para. (1) of this clause owing and unpaid; and

(c) to forfeit and retain for himself a sum equivalent to twenty (20) per cent of the purchase price from the instalments (excluding interest) previously paid by the purchaser.

The words underlined above are not found in the 1979 Rules. Thus Counsel submitted that under the 1979 Rules, it was not intended that the vendor should still have the Common Law right of seeking specific performance over the property.

I am afraid I do not see how the absence of those words under the 1979 Rules necessarily suggests that the Common Law rights of the vendor to ask for specific performance has been restricted or ousted. The remedy of specific performance is distinct and separate from that of treating and accepting a breach by the purchaser as a repudiation of the contract which gives the vendor a right to claim for damages. In my view, the inclusion of those words in the 1985 Rules merely means that in the event the vendor opts to proceed under Clause 5(3) and treats the default as a repudiation, other rights (if any) of the vendor under general law, which are not covered under Clause 5(3)(a), (b) and (c), are not prejudiced.

For the aforesaid reasons, I allowed the appeal by the plaintiffs and granted an order for specific performance and a declaration that the plaintiffs were entitled to a lien upon Unit No. B1-10 for the unpaid balance of the purchase price and that the plaintiffs were at liberty to apply to enforce the lien by sale.

Also found at [1990] 1 CLJ 347